A

WONG LEH YIN

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
ZAHARAH IBRAHIM JCA
MOHAMAD ARIFF YUSOF JCA
[CRIMINAL APPEAL NO: Q-09-154-05-2012]

C

16 MAY 2013

CIVIL PROCEDURE: *Proceedings - Petition of appeal - Preliminary objection - Petition of appeal filed in Bahasa Malaysia before High Court in Sarawak - Whether incurably defective - Whether bad in law and*

D

inadmissible - Whether use of Bahasa Malaysia expressly prohibited - Whether objection purely a technicality - Whether there was miscarriage of justice - Whether preliminary objection flawed - Rules of the High Court 1980, O. 2 r. 3 - Federal Constitution, art. 161(2)(b)

E

CONSTITUTIONAL LAW: *National language - Use of National language in courts - Petition of appeal filed in Bahasa Malaysia instead of in the English language - Whether incurably defective - Whether bad in law and inadmissible - Federal Constitution, art. 161(2)(b)*

F

This was the appellant's appeal against the dismissal of his preliminary objection that the Public Prosecutor's petition of appeal was written in Bahasa Malaysia and therefore defective and to be disregarded. The objection was based on art. 161(2)(b) of the Federal Constitution and the 20 Point Malaysia Agreement which provides for the use of the English language as the official language

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in Sarawak. It was the appellant's submission that the petition of appeal filed before the High Court in Sibu, not being in the English language, was bad in law and inadmissible, with the consequence that there was no valid petition of appeal filed before the High Court within 14 days after the grounds of decision of

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the Sessions Court Sibu was served upon the Public Prosecutor, contrary to s. 307(4) of the Criminal Procedure Code and under s. 307(9) thereof, deemed to have lapsed or been withdrawn.

I

Held (dismissing appeal)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) Firstly, for the purpose of clarity, the term proceeding is defined in s. 3 of the Courts of Judicature Act 1964 as meaning any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding. Secondly, cl. (1) of art. 161 of the Federal Constitution makes it abundantly clear that it prohibits any Act of Parliament terminating or restricting the use of the English language for any of the purposes mentioned in cl. (2) to (5). Thirdly, cl. (1) applied for ten years from Malaysia Day. Hence, the preliminary objection insofar as it was based on art. 161(2)(b) was flawed. (paras 7-10)

(2) The document produced in court, as evidencing the "20 Point Malaysia Agreement", which provides that "English shall be an official language of Borneo (Sabah & Sarawak) for all purposes ..." was of uncertain origin. The said document could not be accepted as authoritative and the submission devoid of merit. Even if accepted as such, all that was needed was to understand the distinction between "an official language" and "the official language", in which case the use of Bahasa Malaysia was not prohibited, and it was also an official language. (paras 14 & 15)

(3) It was not the appellant's objection that because of the use of the national language, the appellant had been denied an opportunity to appreciate what the grounds of appeal were and was, therefore, denied an opportunity to defend himself. The objection that the petition of appeal was filed in the High Court in Bahasa Malaysia, was purely a technicality, when it is now trite that the Rules of the High Court 1980 are operative and apply equally to both civil and criminal proceedings. (para 21)

(4) Order 2 r. 3 of the Rules of the High Court 1980 makes it clear that a court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of the Rules unless the court or judge was of the opinion that such non-compliance had occasioned a substantial miscarriage of justice.

A Laws, both statute and case law, as well as rules of procedure, ought ordinarily to be read liberally or permissively to facilitate justice, and not be so read as to handicap it. Thus, there was no miscarriage of justice demonstrated in this case. (para 21)

B

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap penolakan bantahan awalan yang dibuat olehnya terhadap petisyen rayuan pihak Pendakwa Raya yang telah difailkan dalam Bahasa Malaysia dan dengan itu, C adalah defektif dan harus diketepikan. Bantahan yang dibuat adalah berdasarkan perkara 161(2)(b) Perlembagaan Persekutuan dan "20 Point Malaysia Agreement" yang memperuntukkan penggunaan Bahasa Inggeris sebagai bahasa rasmi di Sarawak. Perayu berhujah bahawa petisyen rayuan yang telah difailkan di D hadapan Mahkamah Tinggi di Sibu, kerana tidak difailkan dalam Bahasa Inggeris, adalah salah dari segi undang-undang dan tidak boleh diterima, dengan akibat bahawa tiada petisyen sah yang telah difailkan di hadapan Mahkamah Tinggi dalam tempoh 14 hari selepas alasan penghakiman Mahkamah Sesyen Sibu disampaikan E kepada pihak Pendakwa Raya, bertentangan dengan s. 307(4) Kanun Tatacara Jenayah dan di bawah s. 307(9), disifatkan telah luput atau ditarik balik.

Diputuskan (menolak rayuan)

F **Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:**

(1) Pertama, bagi tujuan kejelasan, terma prosiding adalah di jelaskan di bawah s. 3 Akta Mahkamah Kehakiman 1964 yang G bermaksud apa-apa prosiding yang bersifat sivil atau jenayah dan termasuk permohonan di mana-mana peringkat prosiding. Kedua, kl. (1) perkara 161 Perlembagaan Persekutuan menjadikannya jelas bahawa ia melarang mana-mana Akta Parlimen menamatkan atau menyekatkan penggunaan Bahasa H Inggeris bagi mana-mana maksud yang disebutkan di bawah kl. (2) hingga (5). Ketiga, kl. (1) digunakan selama sepuluh tahun daripada Hari Malaysia. Oleh itu, bantahan awalan setakat ia berdasarkan perkara 161(2)(b) adalah cacat.

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(2) Dokumen yang dikemukakan di mahkamah, sebagai membuktikan "20 Point Malaysia Agreement", yang memperuntukkan bahawa "Bahasa Inggeris harus digunakan sebagai bahasa rasmi Borneo (Sabah & Sarawak) untuk semua tujuan ..." adalah tidak pasti asalnya. Dokumen tersebut tidak boleh diterima sebagai sahih dan hujahan itu tidak mempunyai merit. Jikapun ia diterima, apa yang perlu difahamkan adalah perbezaan di antara "an official language" dan "the official language", di mana penggunaan Bahasa Malaysia tidak dilarang, dan ia juga merupakan bahasa rasmi.

(3) Ia bukan bantahan perayu bahawa dengan penggunaan bahasa rasmi, perayu telah dinafikan peluang untuk menghayati alasan rayuan, dan dengan itu, telah dinafikan peluang untuk membela dirinya. Bantahan bahawa petisyen rayuan telah difailkan di Mahkamah Tinggi dalam Bahasa Malaysia, adalah alasan teknikal semata-mata, apabila ia kini nyata bahawa Kaedah-Kaedah Mahkamah Tinggi 1980 adalah berkuatkuasa dan digunapakai secara sama rata kepada kedua-dua prosiding sivil dan jenayah.

(4) Aturan 2 k. 3 Kaedah-Kaedah Mahkamah Tinggi 1980 adalah jelas bahawa mahkamah atau hakim tidak akan membenarkan bantahan awalan oleh mana-mana pihak kepada mana-mana kausa atau perkara atau prosiding hanya atas alasan ketakpatuhan kaedah-kaedah melainkan jika mahkamah atau hakim berpendapat bahawa ketidakpatuhan itu telah menyebabkan satu salah laksana keadilan yang berat. Undang-undang, dari segi statut dan kes, serta peraturan prosedur, secara lazimnya harus dibaca secara liberal atau secara permisif untuk memudahkan keadilan, dan bukan untuk dibaca sebagai satu rintangan. Oleh itu, tiada salah laksana keadilan yang ditunjukkan di dalam kes ini.

Case(s) referred to:

Dato' Mohamed Hashim Shamsuddin v. Attorney-General Hongkong [1986] 1 CLJ 377; [1986] CLJ (Rep) 89 SC ***(refd)***

Dato Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2010] 1 CLJ 444 CA ***(refd)***

Gapari Kitingan v. Attorney General, Malaysia [1991] 1 CLJ 247; [1991] 1 CLJ (Rep) 129 SC ***(refd)***

Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi [1994] 4 CLJ 47 SC ***(refd)***

Syarikat Telekom Malaysia Berhad v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 SC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Criminal Procedure Code, s. 307(4), (9)
Federal Constitution, art. 161(2)(b)
National Language Acts 1963/67, s. 2
Rules of the High Court 1980, O. 2 r. 3, O. 92 r. 1(2)
Rules of the Court of Appeal 1994, r. 101(2)

For the appellant - Orlando SW Chua; M/s Wong Orlando Chua & Kuok Advocs
For the respondent - Deputy Public Prosecutor, Attorney General's Chambers

[Appeal from High Court, Sibu; Criminal Appeal No: SB-42-7-2011]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant Wong Leh Yin ("appellant") appealed against the dismissal of his preliminary objection that the petition of appeal of the Public Prosecutor dated 17 June 2011 was written in Bahasa Malaysia and, therefore defective and to be disregarded.

[2] The objection was based on art. 161(2)(b) of the Federal Constitution and Point 2C of the 20 Point Malaysia Agreement which provides for the use of the English language in Sarawak.

[3] It was submitted before us that the petition of appeal filed before the High Court in Sibu, not being in the English language, was bad in law and inadmissible, with the consequence that there was no valid petition of appeal filed before the High Court within 14 days after the grounds of decision of the Sessions Court, Sibu, was served upon the Public Prosecutor, contrary to s. 307(4) of the Criminal Procedure Code and, under s. 307(9) thereof, deemed to have lapsed or been withdrawn.

[4] After hearing the submissions for the parties, we dismissed the appeal. Our reasons are as follows.

[5] Article 161 of the Federal Constitution is in Part XIIA pertaining to Additional Protections for States of Sabah and Sarawak provides:

> (1) No Act of Parliament terminating or restricting the use of the English language or for any of the purposes mentioned in Clauses (2) to (5) of Article 152 shall come into operations as regards the use of the English language in any case mentioned in Clause (2) of this Article until ten years after Malaysia Day.
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> (2) Clause (1) applies -
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> (a) to the use of the English language in either House of Parliament by a member for or from the State of Sabah or Sarawak; and
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> (b) to the use of the English language for proceedings in the High Court in Sabah and Sarawak or in a subordinate court in the State of Sabah or Sarawak, or for such proceedings in the Federal Court or the Court of Appeal as are mentioned in Clause (4); and
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> (c) to the use of the English language in the State of Sabah or Sarawak in the Legislative Assembly or for other official purposes (including the official purposes of the Federal Government).

[6] We make three observations.

[7] Firstly, cl. 2(b) is the basis for the instant appeal. For the purpose of clarity, the term proceeding is defined in s. 3 of the Courts of Judicature Act 1964 as meaning any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding.

[8] Secondly, cl. (1) makes it abundantly clear that it prohibits any Act of Parliament terminating or restricting the use of the English language for any of those purposes mentioned in cls. (2) to (5).

[9] Thirdly, cl. (1) applied for ten years from Malaysia Day.

[10] Hence, the preliminary objection insofar as it is based on art. 161 cl. (2)(b), is flawed.

[11] Section 2 of the National Language Acts 1963/67 (Revised 1971) Act 32 provides that:

> Save as provided in this Act and subject to the safeguards contained in Article 152(1) of the Constitution relating to any other language and the language of any other community in Malaysia the national language shall be used for official purposes.

[12] But, since (a) s. 1(2) thereof provides that the Act shall come into force in the States of Sabah and Sarawak on such dates as the respective State Authorities may by enactments of the Legislatures of the respective States appoint and different dates may be appointed for the coming into force of different provisions of the Act in those States, and (b) no such dates has been appointed, it is of no further relevance to the consideration of this appeal.

[13] It was submitted in the High Court that Point 2C of the 20 Point Malaysia Agreement provides that:

> English shall be an official language of Borneo (Sabah & Sarawak) for all purposes, State or Federal, without limitation of time.

[14] The document produced in the bundle of authorities before the High Court, and reproduced at p. 66 of the record of appeal Jilid 1 before this court, as evidencing the "20 Point Malaysia Agreement" is of uncertain origin. We recall that in the case of the State of Sarawak it was an 18 Point Agreement. Furthermore, the language in the document produced was "English should be an official language of Borneo (Sarawak & Sabah) for all purposes, State or Federal, without limitation of time." How the words of persuasion "should be" transformed into the imperative "shall be" in bold letters at para. (7) of the submissions before the High Court is unexplained.

[15] Clearly, the document produced cannot be accepted as authoritative and the submission devoid of merit. Even if accepted as such, all that is needed is to understand the distinction between "an official language" and "the official language", in which case the use of Bahasa Malaysia is not prohibited, and it is an official language also.

[16] We considered the submission based on O. 92 r. 1(2) Rules of the High Court 1980 where it is provided:

> For Sabah and Sarawak, any document required for use in pursuance of these rules shall be in the English language and may be accompanied by a translation thereof in the national language except that the translation for the purpose of Order 1, rule 6(4) and rule 7(1) must be prepared in accordance with rule 6(5) of that Order:
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> Provided that any document in the national language may be used as an exhibit, with or without a translation thereof in the English language.

[17] Reference was also made to r. 101(2) of the Rules of the Court of Appeal 1994 which is in similar language.

[18] The appellant relied upon the Supreme Court decision in *Syarikat Telekom Malaysia Berhad v. Business Chinese Directory Sdn Bhd* [1994] 2 CLJ 729 SC that O. 92 r. 1 RHC 1980 is a mandatory provision which requires that any document which is not in the national language or in the English language must be translated into the national language before it can be admitted as an exhibit.

> In this case the book "Malaysian Business Chinese Directory" is in Chinese writing. Witnesses told the Court that it contains a list of businesses and trade names together with their telephone numbers. The learned Judge hearing the case cannot rely on the oral evidence of witnesses alone as to what the contents of the book are. It is the primary function and duty of the learned Judge to look at the book, to satisfy himself what it is, and decide, if necessary with the help of experts in the Chinese language and writing, whether the book is in fact a telephone directory as defined by the law. In this case it is impossible for the learned Judge, by looking at the book, to come to any decision simply because he himself is unable to understand what it is.
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> We find that O. 92 r. 1 of the Rules of the High Court 1980, is a mandatory provision which requires that any document which is not in the National language or in the English language must be translated into the National language before it can be admitted as an exhibit. Further, it has been held by the Courts that Rules of Court are to be obeyed. Failure to comply with them will lead to chaos in the conduct of litigation. See *Lee Guat Eng v. Tan Lian Kim* [1985] 2 MLJ 196, *Ratnam V. Cumarasamy & Anor* [1962] 1 LNS 146.

A It is regretted that the well-founded submission of learned Counsel for the respondent went unheeded in the Court below. Secondary i.e. oral evidence of the witnesses about the contents of Ex P7, a document (a book) in Chinese, should not have been considered by the Court below as such evidence would become relevant normally only on the non-availability of Ex P7 as when such non-availability is accounted for in some way. Here Ex P7 was available and the appellant in fact submitted it in evidence without a certified translation of the same in the National language in contravention of O. 92 r. 1 of the Rules of the High Court. The High Court should not have admitted it as an exhibit. Without this book, there is no evidence to substantiate the appellant's claim, and for this reason the appellant's claim must, therefore, fail.

We, therefore, dismissed the appeal with costs.

[19] The above, in our view, demonstrates the application of O. 92 r. 1 RHC. The document rendered inadmissible was evidence that was not in either English or Malay. The third last paragraph suggests that had the said document been translated into English, it would not have been rejected.

[20] The Court of Appeal's decision in *Dato Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad* [2010] 1 CLJ 444 CA was also cited. We note the discretion was exercised to deliver the judgment in English. Despite the firmness in which it was expressed, the decision was not based solely on absence of a memorandum of appeal in the national language, but also upon failure to file a chronology of events, a proper index to Part "C", and although notice had been given from 20 August 2007 and 22 August 2007 of the proposed actions that would be sought if the exhibits were not included into the records, it had been ignored.

[21] We observe that in the instant case, the entire objection is that the petition of appeal was filed in the High Court in Bahasa Malaysia, and on that ground, sought to have it struck out. It was not the objection that because of the use of the national language, the appellant had been denied an opportunity to appreciate what the grounds of appeal were and was therefore denied an opportunity to defend himself. The objection was purely a technicality, when it is now trite that the Rules of the High Court 1980 are operative and apply equally to both civil and criminal proceedings. See *Dato' Mohamed Hashim Shamsuddin v. Attorney-*

General, Hongkong [1986] 1 CLJ 377; [1986] CLJ (Rep) 89; [1986] 2 MLJ 112, *Gapari bin Kitingan v. Attorney General, Malaysia* [1991] 1 CLJ 247; [1991] 1 CLJ (Rep) 129; [1991] 1 MLJ 159; *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi* [1994] 4 CLJ 47; [1994] 1 MLJ 562. Order 2 r. 3 makes it clear that a court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of the Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice. It reflects the view that laws, both statute and case law, as well as rules of procedure, ought ordinarily be read liberally or permissively to facilitate justice, and not be so read as to handicap it. Since there was no miscarriage of justice demonstrated in this case, we dismissed the appeal.